

**BEFORE**

**THE PUBLIC SERVICE COMMISSION OF**

**SOUTH CAROLINA**

**DOCKET NO. 2020-263-E**

August 13, 2021

IN RE: Cherokee County Cogeneration )	
Partners, LLC, Complainant/Petitioner )	<b>SOUTH CAROLINA OFFICE</b>
v. Duke Energy Progress, LLC and )	<b>OF REGULATORY STAFF'S</b>
Duke Energy Carolinas, LLC, )	<b>POST-HEARING BRIEF</b>
Defendant/Respondent )	
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**INTRODUCTION**

Pursuant to S.C. Code Ann. Regs. 103-851, the South Carolina Office of Regulatory Staff (“ORS”) respectfully submits this Post-Hearing Brief to address ORS’s position litigated before the Public Service Commission of South Carolina (“PSC” or “Commission”) during the hearing held in this Docket on July 26, 2021, July 29, 2021, and July 30, 2021.

This matter comes before the Commission on the Complaint of Cherokee County Cogeneration Partners, LLC (“Cherokee”) against Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP”, and collectively, “Duke”). In its Complaint, Cherokee alleges Duke refused to negotiate in good faith and enter into a power purchase agreement (“PPA”) with Cherokee as required by federal and South Carolina law. Cherokee requested resolution of all unresolved terms and conditions necessary for establishment of a PPA pursuant to the Public Utility Regulatory Policies Act of 1978 (“PURPA”), the Orders issued in Docket Nos. 2019-184-E and 2019-185-E, and other relevant Commission Orders. The Commission opened this docket upon the filing of the Complaint by Cherokee on November 2, 2020.

Cherokee specifically requested that the Commission consider and determine the following:

1. Find and conclude that Duke did not engage in free, open and good faith negotiations;
2. Determine the avoided costs during the hearing of the Complaint;
3. Resolve the issues necessary to facilitate a PPA between Cherokee and Duke Energy;
4. Resolve the issues consistent with Cherokee's positions; and
5. Provide interim relief in the form of continuation of payments from Duke Energy to Cherokee under the existing 2012 PPA until the Commission issues a ruling on its Complaint.

ORS provided analysis and recommendations on two (2) of the issues identified in Cherokee's complaint. Those issues are:

1. Determine the avoided costs during the hearing of the complaint; and
2. Provide interim relief in the form of continuation of payments from Duke to Cherokee under the existing 2012 PPA until the Commission issues a ruling on the complaint.

ORS reviewed the Complaint, testimony, filings, and discovery responses and focused on the impact of the complaint and possible outcomes to all customer classes.

### **PROCEDURAL HISTORY**

By electronic notice on November 19, 2020, the Clerk's Office of the Commission notified Duke that it had thirty (30) days to respond to the Complaint and set a hearing for January 26, 2021. On November 30, 2020, Cherokee requested the Commission hold oral arguments regarding Cherokee's request for interim relief. On December 10, 2020, the Commission held oral arguments for the parties to present their respective positions regarding Cherokee's requests for interim relief and an extension of the 2012 PPA. All parties appeared virtually. Cherokee was represented by John J. Pringle, Jr., Esquire; Duke was represented by Rebecca J. Dulin, Esquire; and ORS was represented by Jenny R. Pittman, Esquire.

On December 30, 2020, the Commission granted Cherokee's request for interim relief and extended the 2012 PPA for one hundred and twenty (120) days, ending April 30, 2021. The Commission directed the parties to engage in mediation and provide a status report to the Commission no later than March 1, 2021.<sup>1</sup>

On March 1, 2021, Duke informed the Commission that mediation was unsuccessful, and the parties would work together to establish a new procedural schedule.<sup>2</sup>

On April 9, 2021, Cherokee requested an additional extension of the 2012 PPA. By Commission Order No. 2021-294, the Commission granted an additional extension for an additional one hundred and twenty (120) days, until August 28, 2021. In its Order, the Commission held that Cherokee should bear the economic risk of any possible overpayment from any extension of the 2012 PPA.<sup>3</sup>

On May 3, 2021, Cherokee filed the Direct Testimony and Exhibits of Kurt G. Strunk and Nathan Hanson. On May 24, 2021, Duke filed the Direct Testimony and Exhibits of Michael Keen, and the Direct Testimony of Kendal C. Bowman, John Freund, and Glen A. Snider. ORS filed the Direct Testimony of Dawn M. Hipp. On June 14, 2021, Cherokee filed the Rebuttal Testimony of Kurt G. Strunk and Nathan Hanson.

### **DISCUSSION OF THE HEARING**

The Commission conducted a virtual proceeding in this matter starting on July 26, 2021, and continuing July 29, 2021, and July 30, 2021. All parties and witnesses appeared virtually. The witnesses' testimonies were read as if given orally from the stand and exhibits were moved into the record.

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<sup>1</sup> See Commission Order No. 2020-846.

<sup>2</sup> Duke March 1, 2021, Letter

<sup>3</sup> See Commission Order No. 2021-294.

Cherokee was represented by John J. Pringle, Jr., Esquire; William D. DeGrandis, Esquire; and Jenna McGrath, Esquire. Duke was represented by Frank R. Ellerbe III, Esquire; E. Brett Breitschwerdt, Esquire; and Tracy DeMarco, Esquire. ORS was represented by Jeffrey M. Nelson, Esquire and Jenny R. Pittman, Esquire.

The hearing commenced on July 26, 2021, with Cherokee presenting Kurt G. Strunk, Managing Director of National Economic Research Associates, Inc., as its first witness. Witness Strunk testified to the PURPA requirements for PPAs. Next, Cherokee presented Nathan Hanson, Senior Vice President, Energy and Commercial Management of LS Power and Senior Vice President of Cherokee Cogeneration Partners, LLC. Witness Hanson testified to Cherokee's relationship with Duke and the contract negotiations resulting in this Complaint.

The hearing reconvened on July 29, 2021, with Duke presenting Michael Keen, Business Development Manager with Duke Energy Business Services. Witness Keen testified to the negotiations between Duke and Cherokee. Next, Duke presented John Freund, a Senior Structuring Analyst at Duke. Witness Freund testified to Duke's avoided cost calculations. Duke next presented Glen A. Snider, Director of Carolinas Integrated Resource Planning and Analytics with Duke. Witness Snider testified to the concept of legally enforceable obligations ("LEO") and Duke's methodology for calculating avoided cost rates under applicable laws and Commission precedent. On July 30, 2021 Duke presented as its final witness Kendal C. Bowman, Vice President Regulatory Affairs and Policy North Carolina for DEC and DEP. Witness Bowman testified to the legal principles and policy issues raised by Cherokee's Complaint related to the implementation of PURPA.

ORS presented as its witness, Dawn M. Hipp, Chief Operating Officer. Witness Hipp testified that ORS's position in this proceeding was limited to ensuring that Duke's customers not pay more

than the appropriate Commission-approved avoided energy and avoided capacity costs for power supplied by Cherokee under the terms of a successor PPA. ORS recommended that the dollar amount attributed to the incremental overpayment to Cherokee due to the extension of the terms of the current 2012 PPA be credited or refunded to Duke Energy customers in a manner determined by the Commission. Ms. Hipp testified that the credit or refund to customers could be accomplished through lower payments to Cherokee under the successor PPA. Witness Hipp opined that because Cherokee is not under the jurisdiction of the Commission, the customers of Duke Energy may be forced to bear the entire burden of the overpayment to Cherokee if a successor PPA is not reached between the Cherokee and the Companies. As stated in Duke Energy's letter filed April 20, 2021, Duke Energy's customers will have paid close to \$1,000,000 over the current avoided cost rates when the first 2012 PPA extension expired on April 30, 2021. ORS informed the Commission that the estimate of the overpayment is not insignificant and that neither Duke Energy nor its customers should be harmed if the Commission ultimately determines the rates to be paid to Cherokee under a new PPA are less than the current 2012 PPA. It is ORS's position that Cherokee should bear the economic risk of any extensions of the current 2012 PPA.

Witness Hipp additionally reserved ORS's right to review and examine the amount of any overpayment and the payment amount, terms, and conditions of successor PPA. ORS takes the position that it may make recommendations to protect customers in any future proceeding where the costs for purchased power may be recovered.

Finally, Cherokee presented the rebuttal testimonies of witnesses Hanson and Strunk. Witness Hanson responded to Duke's arguments regarding the existence of a LEO in 2018. Witness Strunk responded to Duke's testimony regarding the negotiations between the parties and the methodology for calculating Duke's avoided cost rate.

## LEGAL ARGUMENT

ORS represents the public interest of South Carolina, with “public interest” defined as “the concerns of the *using and consuming public with respect to public utility services*, regardless of the class of customer, and preservation of continued investment in and maintenance of utility facilities so as to provide reliable and high-quality utility services.” S.C Code Ann. § 58-4-10 (B) (Supp. 2019) (emphasis added).

ORS is the sole party in this proceeding representing the public interest, including Duke’s residential and non-residential customers. ORS therefore focused its analysis and recommendations on ensuring Duke’s customers not pay more than the appropriate Commission-approved avoided energy and avoided capacity costs for the power supplied by Cherokee under the terms of a successor PPA. The cost of purchased power is directly passed through to all classes of customers as fuel costs pursuant to the Fuel Adjustment Clause. S.C. Code Ann. § 58-27-865. Under the current law, Duke is therefore entitled to recover from its customers the prudently incurred costs of purchased power, including avoided costs under PURPA, from qualifying facilities (“QF”) such as Cherokee.

The principle issue in this proceeding is a contractual dispute between Cherokee and Duke. ORS does not engage in purchased power contract negotiations such as that at issue here. Rather, during the annual Fuel Adjustment Clause proceedings ORS reviews the negotiated and standard offer PPAs to verify that the purchased power costs recorded by the electric utility are accurate and reflect the appropriate avoided costs.

Through oral arguments, mediation, and testimony, ORS attempted to make it clear to the parties and the Commission that its position was limited to ensuring Duke’s customers not overpay

for any power Duke purchased from Cherokee. Duke made similar arguments in support of their position during both oral arguments and through its witnesses' testimony.

As testified to by ORS Witness Hipp, the Commission approved two (2) temporary extensions of the current PPA between Cherokee and Duke Energy for the time period of January 1 through August 28, 2021. ORS objected to the most recent temporary extension of the current PPA due to the absence of proper safeguards to protect Duke Energy customers from increased purchased power costs. ORS recommends that in the event the Commission determines that going forward the price paid by Duke Energy to Cherokee for the power generated by Cherokee is less than the price paid under the 2012 PPA, that the dollar amount attributed to the incremental overpayment to Cherokee due to the extension of the terms of the current 2012 PPA be credited or refunded to Duke Energy customers in a manner determined by the Commission.

Supporting ORS' position in this case, during the hearing, Cherokee witness Hanson confirmed that Cherokee would be obligated to credit back to Duke's customers any difference between the final avoided cost rates approved in this docket and the 2012 PPA rates Cherokee has been paid during the multiple 2012 PPA extensions since January 1, 2021. Duke through its testimony also advocated for a true-up for the difference between the final approved avoided cost rates and the 2012 PPA. The Commission, likewise, acknowledged in Commission Order No. 2021-294, that Cherokee should bear the economic risk of any possible overpayment from any extension of the 2012 PPA.<sup>4</sup>

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<sup>4</sup> See Commission Order No. 2021-294.

## CONCLUSION

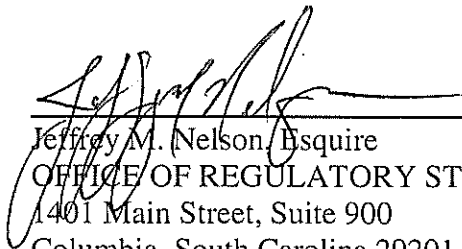
ORS recommends that the successor PPA for Cherokee reflect avoided energy and avoided capacity rates calculated based on the methodology approved by the Commission. PURPA does not require Duke Energy to pay a QF more than it would otherwise cost to generate the power itself or purchase power from another source. The customers of Duke Energy pay directly for purchased power costs and they should not pay more for power purchased from QFs. From the perspective of the customer, the “ceiling” for energy and capacity payments to a QF is one that is based on Duke Energy’s actual avoided costs. Currently, Duke Energy’s customers are paying significantly more than Duke Energy’s actual avoided costs under the extensions of the 2012 PPA with Cherokee.

ORS recommends the successor PPA between Cherokee and Duke Energy limit payments made to Cherokee for energy and capacity at or below the actual avoided costs calculated based on the method approved by the Commission.

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Respectfully submitted,



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